United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

77

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,238

TV SIGNAL COMPANY OF ABERDEEN

and

THE CITIZENS COMMITTEE AGAINST MONOPOLIZATION OF TV,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

THE UNITED STATES OF AMERICA,

Respondents.

Petition for Review of Orders of The Federal Communications Commission

ROGER E. ZYLSTRA
2011 Eye Street, N. W.
Washington, D. C. 20006

Attorney for the Petitioners

INDEX TO APPENDIX

F.C.C. 69-1280

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re ABERDEEN CABLE TV SERVICE, INC., ABERDEEN, S. DAK.	SR-6699-N SR-6691I-N
AND TV SIGNAL CO. OF ABERDEEN, ABERDEEN, S. DAK.	SR-7695-N
Requests for Special Relief Filed Pursuant to Section 74.1109 of the Commission's Rules	

MEMORANDUM OPINION AND ORDER

(Adopted November 19, 1969)

BY THE COMMISSION: CHAIRMAN BURCH NOT PARTICIPATING; COMMISSIONER BARTLEY CONCURRING IN THE RESULT; COMMISSIONER JOHNSON DISSENTING.

1. On May 15, 1969 and June 19, 1969, respectively, Aberdeen Cable TV Service, Inc., and TV Signal Co. of Aberdeen gave notification pursuant to section 74.1105 of the Commission's rules of their intentions to commence CATV operations at Aberdeen, S. Dak., carrying the following television signals: KXAB-TV (NBC, ABC), Aberdeen, S. Dak.; KDLO-TV (CBS), Florence, S. Dak.; KORN-TV (ABC), Mitchell, S. Dak.; KESD-TV (educational), Brookings, S. Dak.; and WTCN-TV (independent), Minneapolis, Minn.[1] Aberdeen is within KXAB-TV's predicted grade A contour and within KDLO-TV's predicted grade B contour.[2] On June 13, 1969, a group which calls itself the Citizens Committee Against Monopolization of TV filed a petition for special relief directed against Aberdeen Cable's proposal, and South Dakota Television, Inc., licensee of KXAB-TV, filed a petition for special relief also directed against Aberdeen Cable. On July 14, 1969, Midcontinent Broadcasting Co., licensee of station KDLO-TV, filed a petition for special relief directed against TV Signal Co.'s proposal.

2. The petitions directed against Aberdeen Cable invoke the mandatory stay provision of section 74.1105(c) of the rules, and seek permanent denial of authorization of its proposed service. The petitions argue that the validity of Aberdeen Cable's franchise is in doubt, and that, since the proposed CATV system is a subsidiary of Midcontinent

[1] On July 24, 1969, TV Signal Co. amended its June 19 notification to delete KFME-TV (educational), Fargo, N. Dak.

[2] Although the American Research Bureau groups Aberdeen in the Sioux Falls, S. Dak., television market (ARB-93), Aberdeen is not within the predicted grade A contour of any Sioux Falls station.

106-518—69——1

Broadcasting Co., Commission authorization should be withheld in view of the proposed restrictions in docket 18397 on cross-ownership of CATV systems and television stations. Midcontinent's petition against TV Signal Co. invokes the mandatory stay provision to prevent TV Signal Co. from commencing service before the petitions against Aberdeen Cable are acted upon. Midcontinent argues that if TV Signal Co. goes forward while Aberdeen Cable is stayed, it will gain competitive advantage. Oppositions have been filed in each case, and Midcontinent has replied.

3. The petitioners herein have not persuaded us that issuance of special relief would be warranted [3] on the basis of their rather conclusory allegations. Compare *Quincy Cablevision, Inc.*, F.C.C. 67–981, 9 F.C.C. 2d 822. Naturally, this decision does not forestall appropriate action should we later determine to adopt a general policy limiting television CATV cross-ownership.[4]

4. Aberdeen Cable has presented uncontradicted evidence that, under South Dakota law, there is presently no judicial stay against Aberdeen Cable's franchise, and that, as a result of a prior lower court action voiding a challenge to the franchise, its franchise is presumptively valid and in effect. In these circumstances, Citizens Committee's reliance on *Laurel Cablevision, Inc.*, F.C.C. 67–1206, 10 F.C.C. 2d 604, for the proposition that the Commission will defer action when a franchise is in litigation is misplaced. Unlike *Laurel Cablevision*, it is clear here who the potential franchisees are, definite carriage proposals have been made, and all requisite pleadings have been filed. Thus, there is no federal purpose or reason of comity for delay.

5. Midcontinent's mandatory stay against TV Signal Co. is presented as a delaying tactic which it is willing to withdraw if the petitions against Aberdeen Cable are dismissed or denied. In these circumstances, there is no Commission policy which would appear to justify further delay of TV Signal's proposal.

In view of the foregoing, the Commission finds that the proposed operations of Aberdeen Cable TV Service, Inc.'s and TV Signal Co. of Aberdeen's CATV systems at Aberdeen, S. Dak., would be consistent with the public interest.

Accordingly, *It is ordered*, That Aberdeen Cable TV Service, Inc., and TV Signal Co. of Aberdeen *Are authorized* to commence operation of their proposed CATV systems at Aberdeen, S. Dak., as proposed in their section 74.1105 notifications of May 15, 1969, and June 19, 1969 (as amended).

It is further ordered, That the petition for special relief filed by The Citizens Committee Against Monopolization of TV on June 13, 1969, *Is denied*.

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[3] None of the petitioners has raised any question concerning the consistency of the proposed CATV services with our interim processing procedures in docket No. 18397. The proposals are consistent with these procedures. However, we note that mutually exclusive applications for construction permits to provide microwave importation of station WTCN–TV into Aberdeen are presently pending (Mountain Microwave Corp., 7705–C1–P–69; and Minnesota Microwave, Inc., 987–C1–P–70).

[4] In par. 23 of the "Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397," F.C.C. 68–1176, 15 F.C.C. 2d 417, the Commission noted that it did not contemplate "grandfathering" in connection with any cross-ownership rules; in its pleadings, Aberdeen Cable indicates its awareness of the possibility of future divestiture.

It is further ordered, That the petition for special relief filed by South Dakota Television, Inc., on June 13, 1969, *Is denied*.

It is further ordered, That the petition for special relief filed by Midcontinent Broadcasting Co., on July 14, 1969, *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

20 F.C.C. 2d

F.C.C. 70-350

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re AMENDMENT OF PART 15 TO REVISE THE LIMIT S. DAK. Requests for Special Relief Filed Pursuant to Section 74.1109 of the Commission's Rules	SR-6699-N(R) SR-6691I-N(R)

MEMORANDUM OPINION AND ORDER

(Adopted April 1, 1970)

BY THE COMMISSION: CHAIRMAN BURCH NOT PARTICIPATING; COMMISSIONER BARTLEY CONCURRING IN THE RESULT; COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE ABSENT.

1. On December 12, 1969, TV Signal Co. of Aberdeen, proposed operator of a CATV system at Aberdeen, S. Dak., and a group calling itself The Citizens Committee Against Monopolization of TV filed a joint petition for reconsideration directed against a portion of the Commission's action in *Aberdeen Cable TV Service, Inc.*, F.C.C. 69-1280, 20 F.C.C. 2d 475. In the cited action, the Commission denied Citizens Committee's petition for special relief, which sought permanent denial of authorization of Aberdeen Cable TV Service, Inc.'s, proposed CATV system at Aberdeen, S. Dak., and authorized Aberdeen Cable to commence its proposed operation. The present petition is opposed by Aberdeen Cable, and TV Signal, and Citizens Committee have replied.

2. In support of their petition for reconsideration, TV Signal and Citizens Committee argue: (*a*) That the Commission erred in judgment, although not in law, by authorizing Aberdeen Cable's operation, since the proposed restrictions in docket No. 18397 on cross-ownership of CATV systems and television stations would prohibit such an authorization;[1] (*b*) that Aberdeen Cable does not really intend to provide the CATV services proposed, but rather is following strike application tactics to discourage or delay TV signal's proposed CATV service; (*c*) that section 1.52 of the Commission's rules requires sanctions against Aberdeen Cable since the Commission determined that Aberdeen Cable filed a petition invoking the mandatory stay provision of section 74.1105(c) of the rules as a delaying tactic; and (*d*) that the Commission failed to consider Citizens Committee's allegation of

[1] In par. 22 of the "Notice of Proposed Rule Making and Notice of Inquiry" in docket 18397, F.C.C. 68-1176, 15 F.C.C. 2d 417, the Commission proposed to prohibit cross-ownership of television broadcast stations and CATV systems within the station's grade B contour. Aberdeen Cable is a wholly owned subsidiary of Midcontinent Broadcasting Co., licensee of station KDLO-TV, Florence, S. Dak., and Aberdeen is within KDLO-TV's predicted grade B contour.

106-533—70——1

regional CATV concentration by Aberdeen Cable's parent company when ruling on Citizens Committee's petition.

3. We rule on petitioners' arguments as follows: (*a*) Petitioners' assertions regarding resolution of the cross-ownership aspect of docket No. 18397 are mere speculation. The Commission has put Aberdeen Cable on notice that divestiture is a possibility, and, under section 74.1109(f) of the rules, we are committed to expeditious resolution of petitions involving new CATV service; (*b*) this allegation is not adequately supported; (*c*) petitioners have misconstrued the Commission's statement. The delay noted resulted from Aberdeen Cable's invocation of the mandatory stay provision to preserve the CATV status quo in Aberdeen during the Commission proceedings, not from an attempt to obstruct Commission processes. It is the latter type of delay to which section 1.52 is directed; and (*d*) in the cited action, the Commission treated petitioners' rather conclusory allegations concerning Midcontinent's CATV interests, among others. The notice of proposed rulemaking, supra, contains general proposals concerning multiple ownership of CATV systems, including the regional concentration aspect. As with the cross-ownership issue, our denial of special relief with respect to petitioners' multiple-ownership allegations does not forestall appropriate action should we later adopt rules limiting CATV multiple-ownership or regional concentrations.

In view of the foregoing, the Commission finds that its action in F.C.C. 69-1280, 20 F.C.C. 2d 475, was consistent with the public interest.

Accordingly, *It is ordered*, That the "Joint Petition for Reconsideration" filed December 12, 1969, by TV Signal Co. of Aberdeen and The Citizens Committee Against Monopolization of TV, directed against the Commission's action in F.C.C. 69-1280, 20 F.C.C. 2d 475, *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX 3

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

RWMcL:CDM
60-211-0

December 9, 1969

John P. Cole, Jr., Esquire
Cole, Zylstra & Raywid
2011 Eye Street, N. W.
Washington, D. C. 20006

Re: Cable TV - Aberdeen, South Dakota

Dear Mr. Cole:

This is in reply to your letter of November 25, asking that the Antitrust Division investigate Midcontinent Broadcasting Company's proposed operation of a cable television system in Aberdeen, South Dakota. It appears that Aberdeen is presently served by one TV station, two radio stations, and one evening and Sunday newspaper, none of which are owned or controlled by Midcontinent Broadcasting. The grade "B" contour of Midcontinent's KDLO-TV does, however, include Aberdeen. In addition, you have stated that the validity of Midcontinent's franchise to operate a cable TV system in Aberdeen is currently being litigated in the state courts. Finally, the Federal Communications Commission has considered the contention that Midcontinent's operation of the Aberdeen cable TV system would not be in the public interest, and has ruled in favor of Midcontinent.

We have reviewed this matter and have concluded that an investigation by the Antitrust Division would not be warranted.

Sincerely yours,

RICHARD W. McLAREN
Assistant Attorney General
Antitrust Division

By: Charles D. Mahaffie, Jr.
Chief, General Litigation Section

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

July 7, 1970

IN REPLY REFER TO:

Charles J. McKerns, Esquire
Dow, Lohnes & Albertson
1225 Connecticut Avenue
Washington, D. C. 20038

Dear Mr. McKerns:

This is in reply to your letter of July 2, 1970, on behalf of Midcontinent Broadcasting Company, in which you requested clarification of the Commission's July 1, 1970 Second Report and Order in Docket No. 18397.

The factual basis of your request is as follows:

> Midcontinent, alone and with others, has over the past several years acquired a number of CATV authorizations within the Grade B contour of its operating television stations. */ These authorizations were in the form of ordinances issued by the respective city councils, a method thought by all concerned, including appropriate city legal officers, to result in fully adequate and valid authorizations. In a number of instances these systems have been constructed and have become operational, all long prior to July 1, 1970. However, recently the Supreme Court of the state of South Dakota has held that CATV systems are public utilities and that throughout the state CATV ordinances must be approved by public referendum to qualify them as CATV franchises. This decision was reaffirmed by the state Supreme Court on June 30, 1970.

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*/ Station KELO-TV, Sioux Falls, South Dakota; Station KDLO-TV, Florence-Watertown, South Dakota; Station KPLO-TV, Reliance, South Dakota

Midcontinent is still pursuing such legal remedies as remain available with respect to this decision. However, in order to protect its position in a number of communities it must submit to public referendum in the near future. Several of these franchise elections are scheduled for mid-July.

You point out that the Second Report provides for a three-year divestiture period "as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970." (Section 74.1131(d)). You request clarification that an "ownership interest" represented by an ordinance previously granted in a manner thought by all concerned to be valid is a sufficient interest to come within the three-year divestiture provision.

The obvious purpose of the provision in Section 74.1131(d) is to treat fairly parties who had expended significant sums in acquiring ownership interests in CATV systems, now proscribed by the Commission's cross-ownership rule. The cut-off selected was July 1, 1970 -- the date of issuance of the Second Report. If, for example, a franchise had been granted on or before that date, then the three-year period would be afforded; after that date, the interest was proscribed.

In the unusual facts stated by you, Midcontinent would be deemed to have "ownership interests" which were in existence on or before July 1, 1970. Some of the systems have been constructed and have become operational ; clearly, as to such systems, fairness dictates the affording of the three-year divestiture period. While the strongest equities are presented as to such systems, the fact is that Midcontinent expended funds as to all its systems and obtained an "ownership interest" thought to be valid prior to July 1, 1970. That being the case, the Commission would afford the three-year divestiture period to all Midcontinent systems as to which authorization by governmental entities

(e.g., city councils) had been granted on or prior to July 1, 1970. It is understood, however, that by July 1, 1973, Mid-continent would be required to divest itself of any interest in such systems which would be contrary to the provisions of 74.1131(a).

Sincerely,

Dean Burch
Chairman

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN REPLY REFER TO:

Charles J. McKerns, Esquire
Dow, Lohnes & Albertson
1225 Connecticut Avenue
Washington, D. C. 20038

Dear Mr. McKerns:

This is with further reference to the Commission's July 7, 1970 letter to you in connection with the impact of the Commission's Second Report and Order in Docket No. 18397 upon Midcontinent Broadcasting Company. Midcontinent was previously granted several CATV franchises in South Dakota which must now be submitted to public referendum.

The charge is made that "to unfairly enhance its competitive position in a hotly contested referendum in Aberdeen . . ., Midcontinent is publicizing [my] letter as official Washington sanctioning of its operations previously declared illegal by the Supreme Court of South Dakota . . ." (Letter of Mr. John P. Cole, Jr., dated July 10, 1970)

I do not of course know whether this charge is correct or not. I would simply stress that I expect from a Commission licensee scrupulous adherence to the truth in such circumstances -- namely, that my letter is not in any way "official Washington sanctioning" of your operations, but only states that you would be accorded the three-year divestiture period.

In ruling that Midcontinent would have three years to divest in those cases where it had earlier been granted what had been considered valid franchises, the Commission was not declaring that Midcontinent had any special equities going for it in the South Dakota local elections, nor was there any intent to favor in any way the referendum bid of Midcontinent or of any other applicant similarly situated. In fact, the Commission's letter was based upon the premise -- which continues to be operative -- that Midcontinent, at best, would have to dispose of any interest it wins in the voting, the only question being whether it would be required to dispose of its interests immediately or at the end of a three-year period.

Sincerely,

Dean Burch
Chairman

cc: Cole, Zylstra and Raywid

BRIEF FOR PETITIONERS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,238

TV SIGNAL COMPANY OF ABERDEEN

and

THE CITIZENS COMMITTEE AGAINST MONOPOLIZATION OF TV,

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and

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ADMINISTRATIVE DECISIONS:

STATUTES AND REGULATIONS:

Page

MISCELLANEOUS:

* Cases chiefly relied upon

STATEMENT OF THE ISSUES

1. Whether the FCC's authorization of proposed new CATV services without consideration of the merits of Petitioners' allegations regarding the Commission's established and proposed media diversification of control rules constituted an abuse of administrative discretion.

2. Whether the services authorized by the FCC were in violation of its existing and proposed media diversification of control rules.

3. Whether the services authorized by the FCC were in violation of the antitrust laws.

* This case has not previously been before the Court.

REFERENCES TO RULINGS

Aberdeen Cable TV Service, Inc., (FCC 69-1280) 20 F.C.C.2d 475 (1969)

Aberdeen Cable TV Service, Inc., (FCC 70-350) 22 F.C.C.2d 239 (1970)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA

No. 24238

TV SIGNAL COMPANY OF ABERDEEN and
THE CITIZENS COMMITTEE AGAINST
MONOPOLIZATION OF TV,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA
Respondents,

ABERDEEN CABLE TV SERVICE, INC.,
Intervenor

On Petition For Review of Orders
of the Federal Communications Commission

BRIEF FOR PETITIONERS

STATEMENT OF THE CASE

1. Preliminary Statement

This is a petition for review of memorandum opinions and orders of the Federal Communications Commission

[20 F.C.C.2d 475 (1969), 22 F.C.C.2d 239 (1970)]which authorized Aberdeen Cable TV Service, Inc. to commence operation of its CATV system in Aberdeen, South Dakota, denied the Petition for Special Relief filed by the Citizens Committee Against Monopolization of TV, and denied the Joint Petition for Reconsideration of TV Signal Company of Aberdeen and the Citizens Committee Against Monopolization of TV. The F.C.C.'s action in authorizing services by Aberdeen Cable TV and in denying the aforementioned petitions was in conflict with its duopoly policy and its established rules regarding diversification of communications media, and in addition was inconsistent with its proposed cross-ownership policy. Furthermore, the Commission's failure to consider the merits of TV Signal's allegations regarding these matters was contrary to its "case-by-case" diversification of control policy as announced initially in F.C.C. Docket No. 15415. This inaction by the Federal Communications Commission, in refusing to consider Petitioners' contentions and authorizing services in conflict with existing and proposed rules of the Commission, constituted abuse of administrative authority and has caused to TV Signal Company of Aberdeen severe competitive injury.

The petition for review was filed pursuant to §402(a) of the Communications Act of 1934, as amended, 47 U.S.C.§402(a).

2. The Proceedings Before the FCC

In March 1966, the Federal Communications Commission asserted jurisdiction over all community antenna television ("CATV" or "cable TV") systems [1/] and adopted rules regulating systems. [2/] See Second Report and Order, 2 F.C.C. 2d 725(1966); 47 C.F.R.§74.1101-1109. Its jurisdiction to regulate CATV systems was upheld by the Supreme Court in United States v. Southwestern Cable Co., 392 U.S.159(1968).

Section 74.1105 of the FCC's regulations, 47 C.F.R.§74.1105(a), provides that CATV systems desiring

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1/ A CATV system picks up television signals by means of a high antenna located at a point of good reception, amplifies them and carries them into a community by means of a cable or microwave transmission, and then distributes them by cable to the homes of individual subscribers who pay a monthly fee and commonly an initial charge. See 47 C.F.R.§74.1101(a). An excellent contemporary discussion of the history of CATV development and regulation is set forth in the companion cases (decided one week apart) of United States v. Southwestern Cable Co., 392 U.S.159(1968) and Fortnightly Corporation v. United Artists, 392 U.S.390(1968).

2/ The text of these rules is reproduced as Appendix I hereto.

to commence new or expanded CATV service must first give notice to local television broadcast stations. Upon the giving of such notice, local television stations and any interested persons are entitled to file petitions pursuant to §74.1109 of the F.C.C.'s rules, 47 C.F.R. §74.1109, challenging the new or expanded service. The filing of such a petition invokes the automatic stay provision of §74.1105(c), 47 C.F.R. §74.1105(c), which provides that, upon the filing of a petition under §74.1109, new service which is challenged in the petition shall not be commenced until after the F.C.C. has issued a ruling on the petition.

On May 17, 1969, Aberdeen Cable TV Service filed with the F.C.C. copies of its notice of proposed new CATV service in Aberdeen, South Dakota.[3/] Aberdeen Cable TV Service, Inc. is a wholly-owned subsidiary of Midcontinent Broadcasting Company (hereinafter Midcontinent), licensee of television station KDLO-TV, operating on Channel 3 in Watertown-Florence, South Dakota, which encompasses Aberdeen within its service contour. Thus, Aberdeen Cable's proposal

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3/ Petitioners received the local notice, which was dated April 17, 1969, on May 15, 1970.

contemplated operation of its CATV system within the service contour of a television broadcast station licensed to its parent, Midcontinent. Midcontinent also has extensive media interests throughout South Dakota, as well as in Wisconsin, Nebraska and Iowa. Midcontinent is the licensee of KELO-TV, KDLO-TV and KPLO-TV, all television stations licensed to the State of South Dakota.[4/]

4/ Midcontinent's three VHF stations in Sioux Falls, Watertown (Florence) and Reliance are credited by the American Research Bureau with circulation in counties comprising 94% of South Dakota's population. Its net weekly circulation exceeds the combined circulation of all other TV stations in the state. In a state with only 22 towns with a population of 3,000 or more, Midcontinent now owns or controls 16 of 20 CATV systems or franchises. Midcontinent also owns: KDLO-FM, Watertown, where it is a CATV applicant; KELO-AM and FM, Sioux Falls, where, in combination with the only other TV station in that Top 100 market, it also holds the CATV franchise; WKOW-TV and AM, and CATV in Madison, Wisconsin; and CATV in Aberdeen, Highmore, Huron, Madison, Miller, Pierre, Redfield, Webster and Winner, South Dakota and nearby Pipestone, Minnesota, Valentine, Nebraska and Storm Lake, Iowa. In combination with Duhamel Broadcasting Enterprises, the next largest TV empire in the State, (KOTA-TV, Rapid City, KDUH-TV, Hay Springs and KHSD-TV, Deadwood-Lead), Midcontinent also has CATV systems in Belle Fourche, Deadwood, Hot Springs, Lead, Spearfish and Sturgis, South Dakota. Midcontinent's combined CATV service areas (existing systems or franchises it controls) give it exclusive coverage of 59% of the State's population residing in towns of 3,000 or more and 70% of the population residing in towns where CATV has been authorized. Finally, it also owns WLOL-AM and FM, Minneapolis and WAOW-TV, Wausau.

Midcontinent Broadcasting Company sought, and obtained on August 12, 1968, a permit to construct and operate a CATV system in Aberdeen, South Dakota. The issuance of this permit was subsequently invalidated by public referendum. The validity of this referendum requirement and its necessity as a condition to the commencement of CATV services in a South Dakota community have recently been upheld by unanimous opinion of the Supreme Court of that state.[5/]

Believing that it would be premature for the Commission to permit Midcontinent's subsidiary Aberdeen Cable to proceed with its proposed CATV services in Aberdeen, and in view of the Commission's proposed restrictions on cross-ownership of CATV systems by television stations within their predicted service contours[6/] and its general policy against media concentration, the Citizens Committee Against

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5/ A copy of this decision, in which the State Supreme Court found Midcontinent to be without authority to conduct CATV services in Aberdeen, is included herein as Appendix II.

6/ On December 13, 1968, the F.C.C. released a Notice of Proposed Rule Making and Notice of Inquiry wherein the F.C.C. proposed to prohibit the common ownership of a CATV system and television broadcast station within the service contour of the latter. 15 F.C.C.2d 417, 426 (1968). A copy of the relevant portion of the Notice, relating to media diversification, is included herein as Appendix III.

Monopolization of TV[7] (hereinafter Citizens Committee) filed with the Commission, on June 13, 1969, pursuant to 47 C.F.R. §74.1109, a petition for special relief seeking invocation of the automatic stay provisions of 47 C.F.R. §1105(c) to prevent Aberdeen Cable TV Service, Inc. (hereinafter Aberdeen Cable) from commencing new CATV services in Aberdeen, South Dakota, and requesting the Federal Communications Commission to permanently prohibit Aberdeen Cable from furnishing such services.

On November 19, 1969, the Commission adopted its Memorandum Opinion and Order, 20 F.C.C.2d 475 (1969) denying the Petition for Special Relief of the Citizens Committee Against Monopolization of TV. It found, principally, that the pendency[8] of litigation before the Supreme Court of South Dakota regarding the validity of the franchise (and, in particular, the public referendum requirement) was not a sufficient bar to prevent Midcontinent from commencing CATV services in Aberdeen, and that the question of media concentration did not warrant grant of the relief requested by the Citizens

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[7] The Citizens Committee is comprised of a representative cross-section of the public of the City of Aberdeen, South Dakota, who are concerned with the monopolization of the communications media in the City of Aberdeen, and the surrounding area, by Midcontinent Broadcasting Company and its subsidiaries.

[8] At the time the Commission issued its decision, the Supreme Court had not yet rendered its decision upholding the referendum requirement.

Committee in view of the fact that the Commission had not acted finally on its proposal to bar TV-CATV cross-ownership.[9/]

On December 22, 1969, TV Signal Company of Aberdeen[10/] and the Citizens Committee Against Monopolization of TV jointly petitioned the Federal Communications Commission for reconsideration of its order authorizing Aberdeen Cable TV Service to commence operation of its CATV system in Aberdeen. They argued principally that, in view of the proposed rules of the F.C.C. which would ban cross-ownership of a CATV system and a TV station within the service contour of the latter, it would be unwise for the Commission to authorize services which would conflict with the proposed rules if subsequently adopted. And, as noted in the Joint Petition, the inadvisability of so doing was heightened by the unlikelihood that the Commission would, at such time, require divestiture by a TV licensee of a CATV system within its service contour. The Commission, in denying the Joint Petition for Reconsideration, dismissed these assertions as mere

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9/ The F.C.C. subsequently denied a motion filed by TV Signal on May 6, 1970 requesting that Aberdeen Cable's authorization be set aside in view of the South Dakota Supreme Court's decision declaring Aberdeen Cable's franchise invalid.

10/ TV Signal Company of Aberdeen is a duly authorized CATV operator in Aberdeen, South Dakota. TV Signal has satisfied local and state requirements by securing a franchise to render CATV services in Aberdeen and by successfully putting its CATV proposal to public referendum in Aberdeen.

speculation.

On May 14, 1970, Petitioners requested the Federal Communications Commission to stay the effect of the above described orders pending petition to the United States Court of Appeals for the District of Columbia for review of the Commission's orders. Said petition for review was filed with this Court on May 15, 1970. Petitioners' request for stay is still pending before the Commission.

On June 25, 1970, the Federal Communications Commission adopted rules prohibiting cross-ownership of television stations and cable TV systems within a single market. Second Report and Order, in Docket No. 18397, 23 F.C.C.2d 816(1970).[11/] The rules, as adopted, prohibit exactly that which the Commission authorized (only two months prior) in the aforementioned orders, and to which Petitioners' opposition was directed.

On June 30, 1970 Petitioners moved this Court to remand the controversy to the F.C.C. with direction to reopen and resolve the matters raised below consistent with the Commission's newly adopted rules prohibiting cross-ownership. This motion was denied by Order of the Court dated September 2, 1970.

11/ A copy of the rules is included herein as Appendix IV.

ARGUMENT

I

CATV SYSTEMS ARE DIRECTLY COMPETITIVE WITH TELEVISION STATIONS FOR NEWS, ADVERTISING AND PROGRAMMING

Cable television is, in many respects, in direct competition with television broadcast stations for news, entertainment and advertising. Since CATV can provide an abundance of channel space at a relatively low cost per channel and greatly expand the opportunities offered by the communications media while reducing the high entry barriers that presently characterize the broadcast media, a cable TV system and television station operating in the same community may very well be directly competitive for various types of local news and advertising. Similarly, locally originated programming viewed on a CATV system may be, for many purposes, sufficiently interchangeable with television stations as to present a direct competitive situation.

The F.C.C. has recognized this competitive situation in its First Report and Order, in Docket No. 18397, 19 F.C.C.2d 201 (1969). There, it remarked that the potential of the cable technology force for enhancing

communications services to the public stems from its expanding channel capacity. Noting that it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, the Commission observed that there was a marked absence of diversity of programming available to the viewing public. It viewed CATV as an alternative source of program origination, but one whose significance would be diminished in the case of common ownership by a broadcast station serving the same community. The clear effect of combined ownership of similar (and for many purposes identical) television media in the same market would be to reduce the diversity of news and information sources available and to lessen the degree of competition for advertising in these media.

Recent developments have also suggested a growing appreciation on the part of the Department of Justice that a competitive relationship may exist between a TV station and cable TV system serving a single community, and that common ownership of the two is inconsistent

with the public interest.[12/] In a series of significant submissions by the Department of Justice in Docket 18397, the Department recognized CATV's developing role as both a natural and potential competitor to television stations in the same market. Noting that because CATV can provide an abundance of channels at a relatively low cost per channel, and recognizing cable TV's role as an emerging source of local originations, the Department of Justice viewed CATV as an actual and potential competitor to television stations in the same market. It reasoned that common control of the two might eliminate this direct competition as well as retard the growth of "the yet unrealized potential for CATV to provide new avenues of competition in the local market for advertising, news and entertainment." Comments of the Department of Justice, in Docket 18397, 16-18, 20 (April 5, 1969).

12/ We note that the Department of Justice, by letter dated December 9, 1969, refused to investigate the problems of media concentration discussed here. We suggest, however, that the Department's briefly stated decision did not relieve the Commission of its obligation to enforce its own media concentration and cross ownership policies in this case.

There can be little doubt that CATV systems and television stations serving a particular community are likely to be direct competitors in terms of news, entertainment and advertising services. In view of relevant federal regulatory policies, any action (such as common ownership of two television outlets serving the same community) which tends to lessen existing, or retard potential, competition within a particular market must be found to contravene the public interest.

II

COMMON OWNERSHIP OF A CATV SYSTEM AND TELEVISION STATION IS ANTITHETICAL TO THE PRO-COMPETITIVE POLICIES UNDERLYING THE COMMUNICATIONS ACT

The evils of cross-ownership of cable systems and television stations within the same market are essentially an extension of a now familiar problem -- concentration of control of the media of mass communications.[13/] Concentration of control of broadcast stations has long

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13/ See Notice of Inquiry, in Docket No. 17371, 7 F.C.C.2d 853 (1967) at para. 2, where the Commission stated

> ...the promised emergence of CATV systems with programming capability in the large metropolitan markets requires that we begin to consider the application of more traditional policies and rules on concentration of control, duopoly, and diversification of mass-media.

Recognition of cable systems as "mass-media" is compelled by their accelerating emergence as originators of television programs --a development the Commission will require of all but the smallest systems under its First Report and Order, in Docket 18397, supra.

been a subject of the F.C.C.'s concern. In addition to its allocation policies which are designed to promote multiplicity of local stations,[14/] the F.C.C. has adopted multiple ownership rules that limit concentration of control of the allocated stations both on a nationwide basis and within individual communities. See 47 C.F.R. §§ 73.35, 73.240, and 73.636. The F.C.C.'s duopoly rule, which prohibits one person from owning or controlling within the same market two stations in the same broadcast service, was recently extended to ban common ownership in the market of any two full-time stations in any broadcast service. First Report and Order, in Docket 18110, 22 F.C.C.2d 306 (1970).

The F.C.C. has explained its multiple ownership rules as designed to promote maximum diversification of ownership of programming sources and viewpoints [see e.g., Report and Order in Docket 15627, 13 F.C.C.2d 357 (1968)], and thus to further what the Supreme Court has recognized as a First Amendment principle: that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare

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14/ See, e.g., Sixth Report and Order on Television Allocations, 7 R.R. 599, 620 (1952).

of the public...". Associated Press v. United States, 326 U.S. 1, 20 (1945); see also Scripps-Howard Radio,Inc. v. F.C.C., 189 F.2d 677, cert. denied, 342 U.S. 830. The Commission has also based these rules on the congressional purpose embodied in the Communications Act:

> One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcast system on a free competitive basis ... This Commission has consistently adhered to the principle of diversification in order to implement the congressional policy against monopoly and in order to preserve competition ... Simply stated, the fundamental purpose of this facet of the multiple-ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest. [18 Fed. Reg. 7797 (1953)].

Judicial recognition of the evils of mass media concentration has been widespread. In F.C.C. v. Pottsville Broadcasting Company, 309 U.S. 134, 137 (1940), the Court stated that "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcast field." See also National Broadcasting Company v. U.S., 319 U.S.

190, 219 (1943). And, in Mansfield Journal Company v. F.C.C., 86 U.S. App. D.C. 102, 180 F.2d 28 (1950) this Court stated that "(m)onopoly in the mass communication of the news and advertising is contrary to the public interest, even if not in terms proscribed by the antitrust laws." In addition, the multiple-ownership rules have been upheld by the Supreme Court, United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956), as were the provisions of the F.C.C.'s "chain broadcasting regulations" imposing multiple-ownership restrictions on networks, National Broadcasting Co. v. United States, 319 U.S. 190, 206-208 (1943).

This commitment to the promotion of competitive conditions in the dissemination of news and advertising as an important objective in applying the statutory standard of "public interest, convenience and necessity"[15/]

15/ "It is axiomatic that American industries be effectively competitive and undue concentrations of power should be avoided. These propositions are accepted national policy. They are imbedded in the Communications Act as well as in the antitrust statutes and they underlie the American free-enterprise system." Notice of Proposed Rulemaking, Docket 16068, F.C.C. 65-457, adopted June 21, 1965.

has also been reflected in individual licensing proceedings where the F.C.C. has emphasized the desirability of preserving alternative ownership of news sources in the same community. McClatchey Broadcasting Co. v. F.C.C. 99 U.S. App. D.C. 195,239 F.2d 15 (1956), cert. denied, 353 U.S. 918 (1957); Port Huron Broadcasting Co., 5 F.C.C. 177 (1938); see also Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965), F.C.C. Network Broadcasting, Report of Network Study Staff to the Network Study Committee, 64-106 (1957). And this has been stated even in non-comparative license proceedings:

> In any proceeding, comparative or not, the Commission [F.C.C.] has an obligation to determine whether a potential grant will result in a concentration of control of communications media inconsistent with the public interest. [Miami Broadcasting Co., 1 R.R.2d 43, 48 (1961)] [Emphasis added].

In so doing, the F.C.C. considers (among other factors) the significance of the applicant's media interests[16/] in terms of number and size, with reference to the area covered, circulation, and the size of the audience. Policy Statement on Comparative Broadcast Hearings, supra. at 394-5; Miami Broadcasting Co., supra at 48.

16/ A recent F.C.C. Review Board decision specifically held that ownership of a local CATV system should be considered on the diversification issue. Lorain Community Broadcasting Co., 13 F.C.C.2d 106 (1968), reconsid. denied 14 F.C.C.2d 604 (1968).

The F.C.C. has long been concerned about ownership patterns in the cable industry. In 1959, the F.C.C. issued its first report addressed to CATV operations, in which it noted that cross-ownership between a cable system and a television station in the same community might be inconsistent with the policy against duopoly. CATV Systems and Auxiliary Television Services, 18 R.R. 1573 (1959). In 1964, the F.C.C. again addressed itself to the question of cross-ownership. In Lompoc Valley Cable TV, 2 R.R. 2d 22 (1964), the Commission examined the subject in acting upon a transfer of an application for broadcast licenses. It stated that the question was also presented:

> ... (a)s a matter of policy, whether a multiple owner should be permitted to acquire extensive holdings in the community antenna field or whether the policy underlying the Commission's multiple ownership rules requires that the Commission strive to prevent such entry.

The Commission did not answer this question in Lompoc Valley, but it did express an opinion subsequently in the Rust Craft Broadcasting case, 36 F.C.C. 1549, 1550, (1964), where it stated in regard to cross-ownership between VHF licensees and cable systems in the same community:

> Where a CATV operator seeks to acquire the only television station in the community, questions are raised which normally do not arise in connection with transfer applications. We believe it more healthy to have these entities -- which compete with each other for the attention and support of the public -- in separate hands in the ordinary case.

Although the Commission approved the proposed transfer, this Court was unsatisifed by this disposition; it held that the Commission should not have approved the station's transfer without a hearing. It described the policy against duopoly as "a major public interest," and directed the Commission to consider the applicability of that policy to the proposal to combine the cable system and television station. Citizens TV Protest Committee v. F.C.C. 121 U.S. App. D.C. 50, 348 F.2d 56 (1965). Although the hearing by the Court was never held because the case was mooted by sale of the cable system, what was clear from this Court's holding was that the Commission is required to give more than a mere passing examination to the cross-ownership implications of any proposed action which would affect the diversity of media services in a particular community.

Subsequently, the F.C.C. instituted an investigation into the effects of common ownership of cable systems and television stations. Notice of Inquiry in the Matter of Acquisitions of Community Antenna Television Systems by Television Broadcast Licensees, Docket No. 15415, 29 F.R. 5416 (1964). This investigation, terminated in 1965, was reinstituted in April of 1967. The F.C.C. announced that the primary reason for resuming its investigation was the emergence of CATV systems in larger communities and the

increasing trend toward program origination by CATV systems. Finally, on December 13, 1968, Docket 18397 was instituted inquiring into, in part, the problems posed by cross-ownership of a television station and CATV system within the Grade B contour of the television station. 17/

It is evident that the Communications Act, rules promulgated thereunder, and the policies which underlie the regulatory provisions adminstered by the Commission, all have in common one distinct characteristic -- they are all designed to foster the greatest possible degree of competition in the provision of communications services to the public. Common ownership of a cable system and a TV station in a single community would significantly lessen competition in the provision of television services and must, therefore, be considered antithetical to the public interest. And where, as here, the problem is exacerbated by the vast media interests of Midcontinent throughout the State of South Dakota, the Commission clearly abused its discretion in authorizing Aberdeen Cable TV to proceed.

17/ Subsequent to the filing of the petition for review herein, the Commission issued its Second Report and Order in Docket 18397, 23 F.C.C.2d 816 (1970) adopting its proposed prohibition of cross-ownership between television stations and cable TV systems. Therein, it concluded that

> the public interest would be best served by the adoption of a rule prohibiting local cross-ownership of CATV systems and television broadcast stations. Such a rule would further the Commission's policy favoring diversity of central over local mass communications media. [23 F.C.C.2d at 820]

III

CROSS-OWNERSHIP IS IN CONFLICT WITH FEDERAL ANTITRUST LAWS AND THEIR UNDERLYING POLICIES

The national policies embodied in both the Communications Act and the antitrust laws compel a presumption that the combination of two competitors, each of which possesses a substantial market share (and each of which is practically invulnerable to competitive entry), would threaten the public interest. In this regard there can be little doubt that the Communications Act carries a pro-competitive purpose, and that antitrust considerations must necessarily be accorded weight in the Commission's determinations. See United States v. Radio Corporation of America, 358 U.S. 334, 359 (1959); Northern Natural Gas Co. v. F.P.C., 130 U.S.App. D.C. 220, 399 F.2d 953 (1968). When viewed in light of the clear and applicable federal policies favoring competition, it is readily apparent that cross-ownership between a television station and a cable system in the community obliterates several forms of competition whose present and future significance is considerable.

In assessing the competitive, or anti-competitive, effect of a questioned action, it is first necessary to define the market in which the action occurs. In the case of cross-ownership, it is clear that the relevant market consists of the service contour of the television station and the overall "community" situated therein.

In United States v. Philadelphia National Bank, 374 U.S. 321, 359 (1963), the Court stated that "(t)he area of effective competition...must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." 374 U.S. at 359, citing Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327. Philadelphia National Bank suggests that a geographic market should include only those suppliers who provide a service which is a reasonable alternative for ordinary customers. See United States v. Pabst Brewing Co., 384 U.S. 546 (1966). This is for all practical purposes, the service contour of the station which primarily serves the particular community.

Similarly, it is necessary to define a relevant product market. In Lorain Journal v. United States, 342 U.S. 143 (1951), the Court treated "mass dissemination of news and advertising" by local media as a relevant product market. 342 U.S. at 147. Thus, in terms of television service, and in view of the wide recognition of the competitive relationship between CATV and broadcast television, the product market is the community served in common by a CATV system and a television station.

"Congress intended to leave competition in the business of broadcasting..." Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 475 (1940). This pronouncement of the Supreme Court clearly reflects that

the antitrust laws (as well as the public interest standard of the Communications Act) are reflective of the national policy in favor of competition. Thus, for example, the antitrust laws prohibit horizontal mergers between direct competitors, particularly in industries with high barriers to entry, unless the merging companies have extremely small market shares or one of them is a failing company. See, e.g., United States v. Von's Grocery 384 U.S. 270 (1966). Common control of a TV station and a CATV system in the same market would no doubt involve market shares in the local market for the provision of television services of at least the magnitude involved in Von's Grocery (8%). This antitrust evaluation is based upon the premise that "competition is likely to be greatest when there are many sellers, none of which has any significant market share." United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963). As the number of competitors becomes fewer, "the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge. That tendency may well be thwarted by the presence of small but significant competitors." United States v. Aluminum Company of America, 377 U.S. 271, 284 (1964).

The Supreme Court has on several occasions declared illegal a merger between a potential entrant and an existing competitor in a concentrated market. See United States v.

El Paso Natural Gas, 376 U.S. 651 (1964); F.T.C. v. Proctor & Gamble Co., 386 U.S. 568 (1967); United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964).

In this regard, the Department of Justice has also observed:

> Common ownership of a CATV system and a television station not only eliminates the existing competition, but eliminates the yet unrealized potential for CATV to provide new avenues of competition in the local market for advertising, news, and entertainment. Where the existing television channels are fully allocated, CATV really offers the only way that additional competitors can enter this market. In a market with few competitors, potential competition is an important economic consideration. [Footnote omitted]. [Comments of the Department of Justice in Docket 18397, supra at 20]

Reasoning that there are necessarily few alternatives for television advertising and programming even in the largest metropolitan areas, it viewed as undesirable the reduction of this number by common control of any two of them. Thus, the Department of Justice has concluded that the economic policies reflected in the antitrust principles supported the Commission's proposal to eliminate cross-ownership of CATV systems and television stations in the same market.

IV

CONCLUSION

Cross-ownership of TV and cable outlets in the same market, particularly where combined with extensive other media interests in a state, may have manifest anti-competitive consequences which conflict with the basic pro-competitive policies underlying the Communications Act and the antitrust laws. Even absent any likelihood of adoption of the Commission's proposed prohibition of TV-cable cross-ownership, the Commission would have been required to consider, prior to authorization, the potential anti-competitive consequences of authorizing services which created this cross-ownership situation. This is a necessary consequence of the Commission's decision in Miami Broadcasting Company, supra, the decision of this Court in Citizens TV Protest Committee, supra, and the broad public interest standard of the Communications Act. This obligation was enhanced by the likelihood, at the time of the Commission's actions, of adoption of its proposed cross-ownership ban. The Commission's refusal to consider Petitioners' cross-ownership arguments, and its attempt to dispose of this issue by stating that, in the event of adoption of the cross-ownership prohibition, any concentration problem created by authorization of Aberdeen Cable's proposal services could be remedied by requiring

divestiture, constituted serious neglect of its responsibility to consider the very basic issue of the media concentration implications of the proposed services. This error is manifested by the F.C.C.'s subsequent adoption of the cross-ownership prohibition.

This abuse of discretion has caused substantial competitive injury to TV Signal Company, from which TV Signal Company seeks relief. TV Signal has been subject to competition from a CATV operator who has not met even the basic state and local requirements for operation of a CATV system in Aberdeen, South Dakota. And the citizens of Aberdeen and the State of South Dakota, as represented by the Citizens Committee Against Monopolization of TV, have been made to suffer monopolization of their community's media outlets and evasion of their validly promulgated local and state laws because of the F.C.C.'s condonation of Aberdeen Cable's flagrant disregard of these laws.

For the foregoing reasons, Petitioners pray that the Court set aside and vacate the orders of the Federal Communications Commission authorizing Aberdeen Cable TV Service, Inc. to commence CATV services in Aberdeen, South Dakota; enjoin Aberdeen Cable TV Service, Inc. from continuing the unlawful rendition of CATV services in Aberdeen; and

remand the matter to the F.C.C. with instructions that the controversy be resolved in accordance with this Court's opinion.

Respectfully submitted,

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September 18, 1970

* * *

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

§ 74.1100 Cross reference.

See § 74.11.

§ 74.1101 Definitions.

(a) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's Grade B contour, shall be deemed an extension of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.685(a) of this chapter.

(d) *Grade A and Grade B contours.* The terms "Grade A contour" and "Grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.

(e) *Network programing.* The term "network programing" means the programing supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" means regularly duplicated by the network programing of one or more stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(g) *Priority.* The term "priority" means the priority among stations established in § 74.1103(a).

(h) *Independent station.* The term "independent station" means a television station which is not affiliated with any national television network organization.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

(j) *Cablecasting.* The term "cablecasting" means programing distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system.

(k) *Legally qualified candidate.* The term "legally qualified candidate" means any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, State, or National, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who:

(1) Has qualified for a place on the ballot, or

(2) Is eligible under the applicable law to be voted for by sticker, by writing his name on the ballot, or other method, and (i) has been duly nominated by a political party which is commonly known and regarded as such, or (ii) makes a substantial showing that he is a bona fide candidate for nomination or office.

[§ 74.1101 *para* (j) & (k) *adopted eff. 12-1-69; III (68)-6*]

§ 74.1103 Requirements relating to distribution of television signals by community antenna television systems.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (c) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the Grade B or higher priority contours of both a satellite and its parent station, the system need carry only the station with the higher priority, if the satellite station and its parent station are of equal priority, the system may select between them.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section.

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programing in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

§ 74.1105 Notification prior to the commencement of new service.

(a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into another community within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any.

(b) The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence.

(c) Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Pro-*

vided, however, That service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107.

(d) The provisions of this section do not apply to any signals which were being supplied to subscribers in the community of the CATV system on March 17, 1966, unless it is proposed to extend lines into another community.

NOTE 1: As used in § 74.1105, the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

NOTE 2: As used in § 74.1105, the term "television broadcast station" includes foreign television broadcast stations.

§ 74.1107 Requirement for showing in evidentiary hearings; Commission approval in top 100 television markets; other procedures.

(a) No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, the date on which copies of the notifications required by § 74.1105 of this chapter were filed with the Commission, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such a response or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers in a community on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: *Provided, however,* That any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area or any extension into another community does come within the provisions of paragraphs (a) and (b) of this section: *And provided further,* That no CATV system located in a community in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend such service to new geographical areas within the same community where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, paragraphs 113–149, would be served by appropriate conditions limiting the geographical extension of the system to new areas in the community. The Commission may

also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

(c) Within 60 days of issuance of a request filed pursuant to paragraph (a) of this section, interested parties seeking simultaneous consideration with such request must file appropriate requests for any other CATV system in the same television market. All requests for CATV systems in a given market timely filed with respect to the first request will be processed and considered simultaneously. Later filed requests for the particular market will be subject to chronological processing and may not be considered in the same proceeding as the earlier requests.

Note 1: As used in § 74.1107, the term "television broadcast station" includes foreign television broadcast stations.

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The commission will expedite its consideration of the question of temporary relief.

(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.

#10731-r-CSH

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

ABERDEEN CABLE TV SERVICE, INC., WALTER A. BROWN AND STACY B. BROWN,

Plaintiffs and Respondents,

vs.

CITY OF ABERDEEN, SOUTH DAKOTA, A MUNICIPAL CORPORATION, J. CLIFTON HURLBERT, AS MAYOR AND MEMBER OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, FRED GERDES, HALE INMAN, AL DONAHUE AND BILL COESTER, AS MEMBERS OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, AND WINIFRED KRAFT, AS CITY AUDITOR OF THE CITY OF ABERDEEN,

Defendants and Respondents,

AND

SOUTH DAKOTA TELEVISION INC.,

Intervenor Defendant and Appellant.

* * * *

APPEAL FROM THE CIRCUIT COURT OF

BROWN COUNTY, SOUTH DAKOTA

HON. SIGURD ANDERSON, JUDGE

Opinion Filed MAY - 5 1970

#10731

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HANSON, Judge.

On August 12, 1968 the Aberdeen City Commission enacted Ordinance No. 1187-Amended entitled:

"An ordinance granting to Aberdeen Cable TV Service, Inc. the non-exclusive right to erect, maintain and operate in, under, over, along, across, and upon the present and future streets, lanes, avenues, sidewalks, alleys, bridges, highways and other public places in the City of Aberdeen, South Dakota and subsequent additions thereto, towers, poles, lines, cables, wires, other apparatus and additions thereto, for the purpose of transmission and distribution by cables and/or wires of television signals to enable sale of community television antenna service to the inhabitants of said City and other purposes, for a period of twenty (20) years, regulating the same, and providing for compensation to the City."

The Ordinance was referred to the electors of the City and substantially defeated at the election. The referendum petitions were determined by the trial court to be insufficient and the election void. Nevertheless, the court concluded Aberdeen Cable TV Service, Inc. was not a public utility and Ordinance No. 1187-Amended was in full force and effect as it did not grant a franchise and did not have to be submitted to a vote of the electors. Therefore, the sole issue on appeal is whether the Ordinance required submission to a vote of the electors

#10731

before it could become effective.

Community antenna television is a relatively new means of television transmission. It is described and explained in a symposium on "Communications" in Vol. 34,No. 2, Law and Contemp. Prob. on p. 238 as follows:

> "Cable television, alias community antenna television (CATV), began for the purpose of serving people in communities which did not receive over-the-air television and has become the potential complete telecommunications system. By linking space satelites, radio, television, facsimile, telephone, teletype, telemetry, computers, data storage and retrieval systems, and other communications hardware in a complete cable-to-home communications system, it is possible to place each person in contact with his full information environment and to allow each person to contribute information to the storehouse of knowledge.

"Cable television had its inception in 1949. By mid-1968, approximately 2,000 cable television systems were operating or under construction. These systems were capable of carrying their own programs, in addition to signals received from regular television stations. Initially, cable television served communities lacking television service or receiving a signal of poor quality. An antenna was placed on a mountain or tall tower, and the signal was picked up, amplified, and transmitted via cable to the viewer's home. Later, microwave relay also was used to bring the signal from the point of origination or capture to the distribution point in the community served. At the distribution center, connection is made with coaxial cable or other wire-distribution lines. Usually, the distribution cable is supported by telephone or electric utility poles, the cable television system paying a rental for the use of the poles. In some cases, the cable is laid beneath city streets, an easement being obtained from the city; in other cases it may be necessary for the cable television system to erect poles for the cable. The signals are amplified at the central distribution point, and, depending upon the length of the cable and other conditions, further amplification of the signal may be necessary along the line. The systems now being installed usually are twelve-channel

systems. However, twenty-channel systems are technically feasible at slightly greater cost, and some such systems have been installed. The multiple purpose cable can carry simultaneously as many signals as there are channels, using different frequencies.

"At home, the cable is attached directly to the television receiver. The viewer, as with the selection of conventional over-the-air broadcasting channels, turns the dial to select the channel carrying the program desired. More than three and a half million homes in the United States are receiving cable television service."

In this state an abutting property owner in a municipality holds fee title to the center of the street, SDCL 43-16-3, subject and subordinate to an easement or servitude in favor of the public. "When a street is used for any proper street purpose by permission of the city authorities, such use does not constitute an additional servitude, though such use may not have been known when the streets were dedicated, appropriated, or condemned for street purposes, and the abutting fee owner is not entitled to compensation for any damages he may sustain by reason of such use." Kirby v. Citizens' Telephone Co., 17 S.D. 362, 97 N.W. 3. But an unauthorized use of the streets for private purposes is compensable. 39 Am.Jur.2d, Highways, Streets, and Bridges, § 160, p. 535. In this respect every municipality in this state is expressly authorized

> "* * *to regulate or prohibit the erection of poles for telegraph, telephone, or electric wires in the public grounds, streets, or alleys, and the placing of wire thereon, and to require the removal thereof from such places and to require the placing of such wires under ground; and to grant and regulate rights and franchises for such purposes. SDCL 9-35-1.

#10731

"The governing body shall grant no franchise to any public utility authorizing it to occupy any of the streets, alleys, or public places of the municipality without submitting the proposition of issuing such franchise to a vote of the electors thereof at a general or special election called for the purpose." SDCL 9-35-3.

In State v. Scougal, 3 S.D. 55, 51 N.W. 858, the court pointed out the term "franchise" means a special privilege conferred by government upon an individual which does not belong to citizens generally by common right. Accordingly, the ordinance granting Aberdeen Cable TV Service, Inc. the right to erect, maintain and operate towers, poles, lines, cables, wires, and other apparatus in, under, over, along, across and upon all the streets, sidewalks, alleys, bridges, and highways in the City of Aberdeen for the transmission and distribution of audio, visual, electronic and electric signals for a period of twenty years is clearly a franchise ordinance as it confers upon a private corporation for profit a right or privilege which does not belong to the citizens of Aberdeen generally by common right. Kornegay v. City of Raleigh, 269 N.C. 155, 152 S.E.2d 186; 36 Am.Jur.2d, Franchises, § 1, p. 723.

The public utility commission is given general supervision of all common carriers in the state, except street railways, SDCL 49-3-4, and for this purpose the term "common carriers" shall be deemed and taken to mean "all corporations, companies, or individuals now owning or operating, or which may hereafter own or operate any railroad, express company, telegraph, or telephone company, in whole

#10731

or in part, in this state." SDCL 49-3-1. These provisions merely designate the public utilities which are now subject to regulation by the commission. Obviously, all public utilities in this state are not under the control and supervision of the public utilities commission, such as water, gas, and electric companies. Furthermore, all common carriers are public utilities, but all public utilities are not common carriers.

The question of whether or not a given business, industry or service is a public utility "does not depend on legislative definition, but on the nature of the business or service rendered, and an attempt to declare a company or enterprise to be a public utility, where it is inherently not such, is, by virtue of the guaranties of the federal Constitution, void wherever it interferes with private rights of property or contract. So, a legislature cannot by mere fiat or regulatory order convert a private business or enterprise into a public utility, and the question whether or not a particular company or service is a public utility is a judicial one". 73 C.J.S. Public Utilities § 2, p. 993. The term "public utility" is defined in Black's Law Dictionary 4th Ed. as follows:

> "PUBLIC UTILITY. A business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence and need, such as electricity, gas, water, transportation, or telephone or telegraph service. Gulf States Utilities Co. v. State, Tex.Civ.App., 46 S.W.2d 1018, 1021. Any agency, instrumentality, business industry or service which is used or conducted in such manner as to affect the community at

#10731

large, that is which is not limited or restricted to any particular class of the community. State Public Utilities Commission v. Monarch Refrigerating Co., 267 Ill. 528, 108 N.E. 716, Ann.Cas. 1916A, 528. The test for determining if a concern is a public utility is whether it has held itself out as ready, able and willing to serve the public. Humbird Lumber Co. v. Public Utilities Commission, 39 Idaho 505, 228 P. 271. The term implies a public use of an article, product, or service, carrying with it the duty of the producer or manufacturer, or one attempting to furnish the service, to serve the public and treat all persons alike, without discrimination. Highland Dairy Farms Co. v. Helvetia Milk Condensing Co., 308 Ill. 294, 139 N.E. 418, 420. It is synonymous with 'public use,' and refers to persons or corporations charged with the duty to supply the public with the use of property or facilities owned or furnished by them. Buder v. First Nat. Bank in St. Louis, C.C.A.Mo., 16 F.2d 990, 992. To constitute a true 'public utility,' the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the legal right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Richardson v. Railroad Commission of California, 191 Cal. 716, 218 P. 418,420. The devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state. Southern Ohio Power Co. v. Public Utilities Commission of Ohio, 110 Ohio St. 246, 143 N.E. 700,701, 34 A.L.R. 171."

It is now settled that community antenna television is subject to governmental regulation and control in the public interest. The Federal Communications Commission asserted jurisdiction over both cable and microwave CATV by issuing regulations governing the carriage of local television signals, signal duplication, and prohibited cable systems, temporarily, from entering the 100 largest television markets of the nation. The Commission's power and

#10731

authority to regulate all CATV systems was affirmed in United States v. Southwestern Cable Co., 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001. Also the state of Nevada imposed statewide public utility regulation over its cable television systems and its constitutionality was upheld by a three-judge federal court in TV Pix, Inc. v. Taylor, 304 F.Supp. 459. Therefore, it would now appear to be merely a matter of how extensive national, state, and local supervision will eventually be asserted and exercised over cable television programs, service, and rates. For our present purposes it is sufficient that the nature and character of CATV renders it subject to governmental control in the public interest.

We conclude that within the purview of SDCL 9-35-1 and 9-35-3 Aberdeen Cable TV Service is a public utility. Consequently, franchise Ordinance 1187-Amended not having been submitted to and approved by the electors of Aberdeen, as required by law, is of no force and effect.

Reversed.

Rentto, Biegelmeier and Homeyer, JJ., concur.

Roberts, P.J., not participating.

Diversification

23. In the area of diversification of control of the media of mass communications, the Commission is proposing three measures, particularly in view of the origination aspect discussed above. Here again, we stress that no grandfathering is contemplated, although consideration will be given to the question of affording an appropriate period within which compliance with the first two requirements is to be achieved. We are proposing, first, to prohibit cross-ownership of television broadcast stations and CATV systems within the station's grade B contour. While the grade B contour appears to be an appropriate standard in view of the Commission's policy of encouraging television broadcast licensees to establish translator facilities in pockets of poor reception within that contour, comments are invited on the desirability of prescribing some other area, such as the 35-mile zone (see pt. IV herein). Comments are also requested on the desirability of prohibiting cross-ownership of CATV systems and all broadcast facilities (including radio) assigned to the same community, and what consideration, if any, should be given to ownership of other local media, such as newspapers.[22]

24. Second, the Commission is proposing rulemaking in the area of multiple ownership of CATV systems. It is contemplated that such rules would limit the total number of systems on a nationwide basis, based on the number of subscribers, the size of the communities, and the regional concentration. In other words, in addition to prescribing the maximum number of CATV systems which any one entity could own, or have an interest in, based upon the number of subscribers and the size of the communities, the proposed rules would limit the number of these that could be located within the same State or adjoining States (taking into account again the number that could be located in major metropolitan areas—e.g., there clearly should be a prohibition of common ownership of CATV systems in cities—i.e., the standard metropolitan statistical area—such as New York, Los Angeles, and Chicago). Comments are requested on the desirability of counting commonly owned systems within the same standard metropolitan statistical area as one system for some or all purposes. In addition to submitting suggestions as to appropriate limitations and the nature of the interest to be counted, interested persons are invited to address themselves to our view that smaller limitations should obviously apply if the CATV operator also has broadcast interests, particularly in television broadcasting.

25. The third measure stems from the Commission's concern, particularly in view of expanding cable-channel capacity, that any one entity should have control over what programing is presented to the public on a large number of channels. We are therefore proposing to limit the number of channels on which CATV originated programing may be presented to one, not including any channels devoted to services of an automatic nature such as time and weather, news ticker, stock market ticker, etc.[23] As to the latter automatic services, we raise the issue whether they should not be subject to displacement, if demand develops among channel lessees (see par. 26 below). Moreover, to the extent that scarcity of CATV channels is presently a factor, a limitation on the number of channels devoted to CATV origination would facilitate operations of the nature next discussed.

[22] Comments filed in docket No. 17371 (32 F.R. 6221) will be considered in this proceeding.

Appendix IV

Cross-Ownership Rules Adopted By the Federal Communications Commission in its Second Report & Order in Docket No. 18397, 23 F.C.C. 2d 816, at 823 (1970)

In Part 74, Subpart K, a new § 74.1131 is added to read:

§ 74.1131. *Diversification of control over communications media.*

(a) *Cross-ownership.* No CATV system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in:

(1) A national television network (such as ABC, CBS, or NBC); or

(2) A television broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers); or

(3) A television translator station authorized to serve a community within which the system is serving subscribers.

Note 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2: The word "interest" as used herein includes, in the case of corporations, common officers or directors and partial (as well as total) ownership interests represented by ownership of voting stock.

Note 3: In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 stockholders:

(a) Only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock;

(b) Stock ownership by an investment company, as defined in 15 U.S.C. section 80a-3 (commonly called a mutual fund), need be considered only if it directly or indirectly owns 3 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company. Holdings by investment companies under common management shall be aggregated. If an investment company directly or indirectly owns voting stock in an intermediate company which in turn directly or indirectly owns 50 percent or more of the voting stock of the corporation, the investment company shall be considered to own the same percentage of outstanding shares of such corporation as it owns of the intermediate company; *Provided, however,* That the holding of the investment company need not be considered where the intermediate company owns less than 50 percent of the voting stock, but officers or directors of the corporation who are representatives of the intermediate company shall be deemed to be representatives of the investment company.

(c) In cases where record and beneficial ownership of voting stock is not identical (e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street name for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties), the party having the right to determine how the stock will be voted will be considered to own it for the purposes of this section.

(d) *Effective date*—The provisions of paragraph (a) of this section are not effective until August 10, 1973, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970 (e.g., if a franchise were in existence on or before July 1, 1970): *Provided, however,* That the provisions of paragraph (a) are effective on August 10, 1970, as to such interests acquired after July 1, 1970.

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,238

TV SIGNAL COMPANY OF ABERDEEN
and THE CITIZENS COMMITTEE AGAINST
MODIFICATION OF TV,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

ABERDEEN CABLE TV SERVICE, INC.,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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FILED OCT 19 1970

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

*Cases and other authorities principally relied upon are marked with an asterisk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,238

TV SIGNAL COMPANY OF ABERDEEN
and THE CITIZENS COMMITTEE AGAINST
MONOPOLIZATION OF TV,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

ABERDEEN CABLE TV SERVICE, INC.,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

QUESTION PRESENTED*

Before the Commission petitioners sought prospective application to Aberdeen Cable of a rule then under consideration which would require that the Aberdeen Cable interest be divested within three years. The Commission declined to apply the rule prospectively but the rule was in fact thereafter adopted. Aberdeen Cable is thus now under the divestment order sought by petitioners at the Commission level. Petitioners now appeal the original Commission order raising the question whether the original refusal to apply the rule prospectively was reasonable.

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* This case has not previously been before this Court.

COUNTERSTATEMENT

Intervenor Aberdeen Cable TV Service, Inc. (Aberdeen Cable) and petitioner TV Signal Company of Aberdeen (TV Signal), on May 15 and June 19, 1970, respectively filed notice of intent to commence CATV service in Aberdeen, South Dakota, as the Commission's CATV rules require. (Rule 74.1105, 47 CFR 74.1105). Duly filed objections to both proposals invoked a provision of the Commission's CATV rules (Rule 74.1105(c), 47 CFR 74.1105(c)), which provides that new service to which objection has been made may not commence until the Commission has ruled on such objection. Objections to Aberdeen Cable's proposal were filed by petitioner The Citizens Committee Against Monopolization of TV, (Citizens Committee), and by South Dakota Television, Inc., licensee of KXAB-TV, an Aberdeen network affiliate whose programs both systems proposed to carry. The Special Relief petition which invoked the mandatory stay of TV Signal's proposal was filed by Aberdeen Cable's parent corporation, Midcontinent Broadcasting Company, licensee of Station KDLO-TV, Florence, South Dakota, within whose Grade B contour both CATV proposals would operate.

Midcontinent's petition was simply designed "to prevent TV Signal Company from commencing service before the petitions against Aberdeen Cable [withwhom it would compete] are acted upon," (A. 1, p. 2). The petitions against Aberdeen Cable made two objections to its proposal: the validity of the Aberdeen Cable franchise was in doubt; and a pending Commission CATV rulemaking proceeding (Docket 18397) looked toward restrictions on cross-ownership of CATV system and television stations.

With respect to the question of Aberdeen Cable's dubious franchise the Commission noted that no present judicial stay was outstanding against the franchise and that "as a result of a lower court action voiding a challenge to the franchise, [it] is presumptively valid and in effect" (A. 1, p. 2). Thus "there is no federal purpose or reason of comity for delay." Id. The argument directed to the cross-ownership matter was essentially based on "rather conclusory allegations," said the Commission, but its rejection "naturally . . . does not forestall appropriate action should we later determine to adopt a general policy limiting television CATV cross-ownership" (Id.). The Commission further noted that the Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397, 15 F.C.C. 2d 417 (1968),

had specifically stated that "grandfathering" was not contemplated "in connection with any cross-ownership rules" and that Aberdeen Cable in its pleadings "indicates its awareness of the possibility of future divestiture."

Midcontinent's mandatory stay against TV Signal Company was characterized as "a delaying tactic which it is willing to withdraw if the petitions against Aberdeen Cable are dismissed or denied. In these circumstances," held the Commission, "there is no Commission policy which would appear to justify further delay of TV Signal's proposal."

All petitions being denied, the services proposed by petitioner and intervenor in their Rule 74.1105 (47 CFR 74.1105) notifications were authorized to commence. Thereupon the Citizens Committee and petitioner TV Signal, which had not previously filed in the matter, jointly requested reconsideration, although admitting that while in their view the Commission "erred in judgment" it did "not [err] in law" (A. 2, p. 1).

The Commission ruled on their arguments in detail, noting in relevant part that assertions concerning the outcome of Docket 18397 "are mere speculation;" that Aberdeen is on notice that divestiture may be required but this proceeding cannot be delayed pending the adoption of any rules since

Rule 74.1109(f), 47 CFR 74.1109(f), requires expeditious resolution of special relief questions and that its original Order had treated and found "rather conclusory" petitioners' allegations concerning Midcontinent's CATV interests. Moreover, "the Notice of Proposed Rule Making [in Docket 18397, supra] contains general provisions concerning multiple ownership of CATV systems, including the regional concentration aspect. As with the cross-ownership issue, our denial of special relief with respect to petitioner's multiple ownership allegations does not forestall appropriate action should we later adopt rules limiting CATV multiple ownership or regional concentrations" (A. 2, p. 2).

Although the instant appeal was brought from that order, subsequent factual developments have occurred which do not affect the legal question before this Court but to some extent affect petitioners' arguments on appeal. First, rules have been issued in the Docket 18397 proceeding, Second Report and Order, 23 F.C.C. 816 (1970), which prohibit common ownership of a television station and a CATV system operating wholly or partly within the Grade B contour of the television station, Ibid., 820-821; see Rule 74.1131, 47 CFR 74.1131. Aberdeen Cable would, as noted above, operate within the Grade B contour

of commonly owned Station KDLO-TV. Of particular relevance here was the further decision to provide "a three-year grace period (which may be extended in individual cases for good cause shown) for divestiture of locally cross-owned CATV systems [held on July 1, 1970] both to facilitate such exchanges and to assure that parties have a reasonable opportunity to recover the value of any properties they are required to sell" Ibid., 821-822. 1/

Also relevant are various developments concerning intervenor's franchise. Briefly, the litigation in train when the matter was first brought before the Commission concerned the question whether under state law CATV systems could be validly franchised by municipal governments as Aberdeen had been or must be approved by a local referendum. Despite the fact that a lower court ruling in Aberdeen Cable's favor was reversed by the State Supreme Court prior to this appeal, 2/ Aberdeen Cable has continued legal operation during continuing proceedings pursuant to Supreme Court Stays of its Mandate.

1/ Subsequent to adoption of the new rules Aberdeen Cable's parent corporation, Midcontinent Broadcasting Company, requested Commission clarification of the rules insofar as they spoke of "ownership" interests acquired prior to July 1, 1970. The clarification was requested in light of the ambiguous legal situation with respect to Aberdeen Cable's franchise. In two letters (A. 4 and 5) over the signature of Chairman Burch the Commission assured Midcontinent that the three year grace period extended to parties in Aberdeen Cable's position who had "ownership interests interests' thought to be valid prior to July 1, 1970. . . ." (A. 4, p. 2).

2/ Aberdeen Cable TV Service, Inc., et al. v. City of Aberdeen, South Dakota, 176 N.W. 2d 738 (S.D. 1970), petition for a writ of certiorari pending (Sup. Ct. O.T. 1970, No. 764).

ARGUMENT

THE COMMISSION REASONABLY DECLINED TO APPLY PROSPECTIVELY ITS SUBSEQUENTLY ADOPTED RULE WHICH NOW REQUIRES DIVESTMENT, WITHIN THREE YEARS, OF THE ABERDEEN CABLE OPERATION.

Before the Commission petitioners urged that the petition for special relief against Aberdeen Cable should be resolved in accordance with the not then adopted rule which would prohibit CATV-television ownership interests like that here involved. The Commission declined at that time to apply the relevant rule prospectively since there had been no decision to adopt it. After Commission decision and prior to appeal the Second Report and Order in Docket No. 18397, supra, adopted the rule, which automatically applied to Aberdeen, requiring divestment by that party's parent corporation. Thus it is manifest at the outset that petitioners have already received that relief which they sought from the Commission insofar as their objections dealt with ownership questions. Although the majority of their brief is devoted to argument intended to establish that Mid-continent's ownership of Aberdeen Cable should be held by this Court to be inconsistent with the Commission's relevant rules and policies, the fact is that the Commission has indeed already

so held, and therefore concurs in the bulk of the allegations made by petitioners. In short, Aberdeen Cable is already under the kind of proscription now sought by petitioners.

Petitioners perhaps could have argued that the rule should not be applied but that an even harsher standard should be applied to Aberdeen Cable instead, requiring divestiture in less than the three years permitted all other like entities. Cf. United States v. Storer Broadcasting Co., 351 U.S. 192; NBC v. United States, 319 U.S. 190. While such an argument would have been barred by 47 U.S.C. 405 since the Commission was urged not to ignore the rule but quite the contrary, to apply it even before its adoption, it does not appear that petitioners are actually urging such a result, although it is by no means clear.

Petitioners do argue, however, that Aberdeen Cable should be proscribed from operating and for this they assert three reasons: the fact that the system comes within the relevant new rule (47 CFR 74.1131); the charge that its franchise is invalid; and the assertion that it is in violation of the antitrust laws of the United States.

Each and all of these arguments are devoid of merit, as the briefest examination reveals. To argue that because Aberdeen Cable comes within a rule, it should therefore be dealt

with in a manner contradictory to the rule is manifestly illogical. And in any event, neither in their brief nor before the Commission have petitioners offered any explanation of how this particular multiple ownership situation differs from all others or any reason why it should be subject to a rule other than that which the Commission has just after long proceedings determined upon as generally appropriate. In any event, to permit ownership of a business but prohibit operation is merely another way of prohibiting ownership. And the rule, which petitionersasked the Commission to apply, does not prohibit ownership during the next three years.

As for the argument based on Aberdeen Cable's questionable status as a franchisee, (supra, p. 6), petitioners misconceive the Commission's role in CATV regulation. The Commission does not license CATV operations. It merely imposes such regulations on CATV operators as are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," United States v. Southwestern Cable Co., 392 U.S. 157, 178. Accordingly, the Commission has not ousted the regulatory jurisdiction of state and local authorities except where that authority is directly contradictory of the Commission. TV Pix, Inc. v. Taylor, 309 F. Supp. 459 (D. Nev.), aff'd 396 U.S. 556. In relevant part the jursidiction exercised by such state and local

entities includes the franchising of CATV systems and "we do not now urge the application of our jurisdiction to the licensing of CATV systems by the FCC." Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397, 15 F.C.C. 2d 417, 425 (1968). While the question of local franchise is thus not normally a part of the Commission's consideration in CATV cases, the fact remains that Aberdeen Cable did have a presumptively valid franchise when the order under appeal was entered as the Chairman noted in his letter to Midcontinent concerning the application of the new rules (A. 4).

However, because the local franchise power and the Commission regulatory power are mutually independent, it is irrelevant to this appeal whether or not respondent has or will have a legal franchise at any time after the Commission reached its decision. Just as the Commission lacks jurisdiction in the matter of a franchise now pending before the Supreme Court on petition for a writ of certiorari to the Supreme Court of South Dakota, so too does this Court. And neither the Commission's finding that operation by respondent would be consistent with our rules nor a judicial affirmance of that finding would preclude the local authorities from finding, at the conclusion

of the on-going State Court litigation, that respondent lacks a legal franchise and must cease operation. If what petitioners seeks is prohibition of operation through a ruling that respondent's franchise is invalid, its proper recourse, with which neither the Commission nor this Court could interfere, is the states's tribunals. If and when such a final ruling issues, respondent will have to cease operating immediately, under State law. If no such ruling issues, it must divest by the end of three years, under federal requirement. 3/

Petitioners' third argument--that respondent's operation should be prohibited as inconsistent with the anti-trust laws of the United States--is equally unavailing. Petitioners have already sought and received a statement from the Antitrust Division of the Department of Justice (A. 3) to the effect that an investigation of the matter "would not be warranted." Moreover, the matters alleged in this connection have, as noted by the

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3/ In commenting on the effect of the Commission's action on the local franchise election, the Commission explained to Midcontinent (A. 5) that "Midcontinent, at best, would have to dispose of any interest it wins in the voting, the only question being whether it would be required to dispose of its interests immediately or at the end of a three-year period."

Antitrust Division, already been taken into account by the Commission in reaching its decision to adopt the rules under which respondent must divest itself of its Aberdeen CATV system within three years.[4/]

In short, the Commission concurs in petitioners' view that respondent's ownership of the Aberdeen Cable system is inconsistent with the public interest and has therefore ordered divestiture. Such divestiture has been ordered by a

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4/ The Commission certainly can and must consider the relevance of conduct in violation of antitrust laws in reaching public interest judgments, NBC v. United States, 319 U.S. 190, 222, Uniform Policy on Violations of Laws, 1 Pike & Fischer, R.R. Part 3, 91:495, 497. Moreover that interest does not necessarily terminate with the adoption of multiple ownership rules if in a particular licensing proceeding allegations are made which go to anticompetitive conduct not specifically embodied in existing rules. See Uniform Policy, supra at page 91:500; F.C.C. v. RCA Communications, Inc., 346 U.S. 86. However, as noted above (p.9), the Commission's interest in CATV operators does not extend to the licensing function, United States v. Southwestern Cable Co., supra. Moreover, the charges of anticompetitive conduct here raised are directed not at Aberdeen Cable, which is not a licensee, but at its parent corporation, which is. Accordingly, while petitioners have failed to persuade the Justice Department that an investigation is required on the present facts and while the presently appealed CATV proceeding is not the proper one in which to raise Midcontinent's licensee conduct, petitioners are free to assert such matters in any licensing proceedings before the Commission involving Midcontinent without regard to the multiple ownership rules or the decision of the Anti-Trust Division not to take present action.

general rule, rather than on an ad hoc basis. Such entirely legitimate procedure (see Midwest Television Corp. v. F.C.C., __ U.S. App. D.C. __, 426 F.2d 1222 (1970)), has not been challenged by petitioners as generally improper; nor has any reason even been suggested why a different standard should be applied here from the one embodied in the general rule.

CONCLUSION

For the reasons stated above, the petition for review filed by TV Signal Company of Aberdeen and the Citizens Committee against Monopolization of TV should be denied.

Respectfully submitted,

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October 19, 1970.

BRIEF FOR INTERVENOR

In The

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,238

TV SIGNAL COMPANY OF ABERDEEN

and

THE CITIZENS COMMITTEE AGAINST MONOPOLIZATION OF TV,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

THE UNITED STATES OF AMERICA,

Respondents,

ABERDEEN CABLE TV SERVICE, INC.

Intervenor

Petition for Review of Orders of
The Federal Communications Commission

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA

No. 24238

TV SIGNAL COMPANY OF ABERDEEN and
THE CITIZENS COMMITTEE AGAINST
MONOPOLIZATION OF TV,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA

Respondents,

ABERDEEN CABLE TV SERVICE, INC.,

Intervenor

On Petition For Review of Orders
of the Federal Communications Commission

BRIEF FOR INTERVENOR

TABLE OF CONTENTS

TABLE OF AUTHORITIES

*/ Authority principally relied on by Intervenor

COUNTERSTATEMENT OF THE ISSUE

1. Whether the FCC's denial of Petitions for Special Relief regarding Intervenor's proposed new CATV services, after consideration of the merits of Petitioners' allegations regarding the Commission's established and proposed media diversification of control rules, was a reasonable exercise of administrative discretion.

COUNTERSTATEMENT OF THE CASE

Because of the lengthy and argumentative nature of Petioners' Statement of the Case, we believe that a Counter-statement will be useful to the Court.

1. Nature of the Case

This case is a Petition for Review of Memorandum Opinions and Orders of the Federal Communications Commission, 20 F.C.C. 2d 475 (1969) and 22 F.C.C. 2d 239 (1970), which denied the Petition for Special Relief filed by Petitioner Citizens Committee Against Monopolization of TV ("Committee"), regarding proposed new CATV service by Intervenor Aberdeen Cable TV Service, Inc. ("Aberdeen Cable"), and later denied the Joint Petition for Reconsideration of Petitioner TV Signal Company of Aberdeen ("TV Signal") and the Committee.

The Petition for Review was filed pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 402(a).

2. The Proceedings Before the Federal Communications Commission

On May 15, 1969 and June 19, 1969 respectively, Aberdeen Cable TV Service, Inc. and TV Signal Company of Aberdeen gave notice pursuant to 47 C.F.R. 74.1105 of their

intentions to commence CATV operations at Aberdeen, South Dakota carrying identical television broadcast signals.

On June 13, 1969, a group which calls itself the Citizens Committee Against Monopolization of TV filed a Petition for Special Relief directed against Aberdeen Cable's proposal. The Petition argued that Aberdeen Cable should not be authorized because it was owned by Midcontinent Broadcasting Company, licensee of Television Station KDIG-TV, Florence-Watertown, South Dakota, which places a predicted Grade B signal contour over Aberdeen. At the time, the Commission had proposed, but not adopted, restrictions in Docket No. 18397 on cross-ownership of CATV systems and television stations within the Grade B contour of such stations. The Citizens Committee also argued that the validity of Aberdeen Cable's ordinance was in doubt. However, the South Dakota Circuit Court, 5th Judicial Circuit, had already ruled that the ordinance was valid.1/

The Commission found that special relief would not be warranted on the basis of the Citizens Committee's

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1/ This unreported opinion can be found in the record as Exhibit C to "Opposition to Petition for Special Relief" filed with the Commission by Aberdeen Cable on July 14, 1969.

"rather conclusory allegations." It noted that it did not contemplate "grandfathering" in connection with any cross-ownership rules; that Aberdeen Cable had indicated its awareness of the possibility of future divestiture; and that its decision did not forestall appropriate action by rule that limited television-CATV cross-ownership.

On April 1, 1970, the Commission denied Petitions for Reconsideration filed by both TV Signal and the Citizens Committee. 22 F.C.C. 2d 239.

3. Statement of the Facts

Midcontinent Broadcasting Company is the licensee of Television Station KELO-TV, Sioux Falls, South Dakota and two "satellite" stations which rebroadcast KELO-TV's programming -- KDLO-TV, Florence-Watertown, and KPLO-TV, Reliance. Aberdeen is 160 miles from Sioux Falls and outside the Grade A contour of Station KDLO-TV, the only Midcontinent station providing service to Aberdeen.

None of the factual statements in Petition n.4 are supported by references to the record, some are untrue, most are inaccurate, and all are irrelevant to this Appeal.

The 1968 authorization of Aberdeen Cable was by ordinance, not by permit, and was not invalidated by public referendum, since the referendum election in question was

itself found to be invalid in the same court decision which held that in any event an election was not required. See Petitioners' Appendix II, p.2. The Supreme Court of South Dakota overturned the lower court only on the issue of whether an election was required, not on the invalidity of the election that was in fact held. See Petitioners' Appendix II, p.8. That appellate decision is the subject of a pending Petition for Writ of Certiorari to the United States Supreme Court.

ARGUMENT

1. The Commission Has Already Ordered Aberdeen Cable to Divest Itself of Its Cross-Ownership Interest; Therefore, Petitioners' Arguments Are Moot

This court is respectfully urged to focus upon the earlier argument raised by Petitioners in their Joint Petition for Reconsideration, filed December 22, 1969, specifically page 2 thereof (Intervenor's Appendix A), wherein they urged reconsideration of the Memorandum Opinion and Order which authorized Aberdeen Cable, on the grounds that the Commission would not order divestiture of the Aberdeen Cable cross-ownership interest held by its broadcast affiliate, Midcontinent Broadcasting Company.

The plain fact is that the Petitioners were proven wrong by the very Commission action which they now say supports their appeal. The new cross-ownership rule, set out at Appendix IV of Petitioner's Brief, requires divestiture by August 10, 1973. See Section 74.1131(d).

Thus, after failing to convince the Commission that it should reverse itself because it might be permanently authorizing service that would not be subject to divestiture and then finding that the Commission in fact did order divestiture, Petitioners now are seeking divestiture now

rather than in 1973. Significantly, Petitioners on June 30, 1970, moved this court to remand this case to the FCC. In the interim, the policy of the Commission has become clearly adverse to Petitioners' position. (See joint appendix 4 & 5, letters from the Commission confirming the availability of a three-year divestiture period to Midcontinent in Aberdeen.) Thus, Petitioners are seeking from this court relief that the Commission on remand would not have provided.

It is respectfully submitted that, rightly or wrongly, Aberdeen Cable has already been given a death sentence by the Federal Communications Commission, with execution to occur no later than three years from now. A sufficiently drastic penalty has therefore been imposed upon Aberdeen Cable. For this court to impose even a more severe penalty of immediate divestiture would be clearly erroneous, especially in the absence of any factual basis for a finding of abuse resulting from the common ownership that will be temporarily permitted for the next three years.

2. No Finding of Abuse or Allegation Thereof is Found in the Record

Even if the court were to assume that even more drastic action than the requirement of divestiture by rule might be in order in particular cases, this is not one of

them. There is absolutely no evidence in the record of any abuse by Aberdeen Cable Service, Inc. nor of any unfair advantage enjoyed by Aberdeen Cable.

The astonishing feature of Petitioners' brief is that although their argumentative Statement of the Case contains various suggestions of error, the argument itself is only a theoretical discussion of the anti-trust considerations related to cross-ownership of media.[2/] But the Commission has already found that: (1) CATV systems do compete to some extent with television stations, (2) common

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2/ Even Petitioners' principal authorities are inapposite. For instance, Miami Broadcasting Company, F.C.C. 63-774, 1 R.R. 2d 43 (1963), involving the sale of the only broadcast station in Miami, Oklahoma to the only newspaper, dealt with a genuine monopoly threat in the absence (at the time) of any rule, existing or proposed, prohibiting common ownership of newspapers and broadcast stations in the same community.

Citizens TV Protest Committee v. F.C.C., 121 U.S. App. D.C. 50, 348 F 2d 56 (1965) was decided before the Commission exercised any regulation of CATV, and involved specific evidentiary questions of abuse threatened by cross-ownership.

ownership of a CATV system and television station is to a certain extent anti-competitive, (3) the anti-trust policy as applied by the Commission shall henceforth proscribe such cross-ownership. Those are the only three points of Petitioners' argument.

Petitioners' brief contains the same arguments that were made to the Commission in the rule-making proceeding, (Docket No. 18397) that resulted in the adoption of new Section 74.1131. In light of the three-year divestiture order, Petitioners' case must fall in the absence of factual support for immediate divestiture. Thus, even if Petitioners had devoted some argument to an explanation of why the Commission violated its "case-by-case" diversification of control policy (Petitioners' Brief, page 2), the argument would be meaningless since there simply is no record of abuse to point to.

Petitioners also repeat the charge that the Commission failed to consider their allegations regarding diversification policy. A Commission, rather than failing to consider these allegations, instead substantially adopted them in its Second Report and Order in Docket No. 18397, 23 F.C.C. 2d 816 (1970). Since then, it has refused to further accelerate diversification absent evidence of abuse. See Michiana Telecasting Corp., F.C.C. 70-108C, _F.C.C.2d_ (October 5, 1970).

At the time of Commission action authorizing Aberdeen Cable's service, there was no existing Commission rule or policy prohibiting such action. Moreover, the proposed rule was not adopted until some seven months later. To impose an ex post facto operation of new 47 C.F.R. 74.1131 would be to violate the effective date provisions of that rule, which prohibits ownership interests that were not in existence on July 1, 1970. The Commission, as demonstrated by joint Appendix IV & V, has recognized that the remedy of divestiture is a drastic one, even if postponed for three years, and has therefore established a policy in this very case of permitting a cognizable ownership interest to continue for a period of three years.

3. All Local Authorizations Were Obtained at the Time of the Commission Actions and Appropriate Remedies with Respect Thereto are Available in South Dakota.

Finally, although Petitioners again devote no argument to the question, it should be noted in passing that the issue of local authorization is not an appropriate concern of this court in this appeal. As the record reflects, the Commission at the time it authorized Aberdeen Cable's operation had uncontroverted evidence that a franchise election was not required in South Dakota as a pre-condition of CATV authorization. Subsequently, the Supreme Court of South

Dakota on May 7, 1970, reversing the Fifth Judicial Circuit of South Dakota, held, even though there is no South Dakota statute designating CATV as a public utility, that it is a public utility, and since public utilities in South Dakota require public referenda, all CATV systems in the state must go through a valid referendum election. Aberdeen Cable TV Service, Inc. v. City of Aberdeen, 176 N.W. 2d 738 (1970). That decision, unprecedented in any other state, is now pending before the Supreme Court of the United States (No. 764, October, 1970 term).

The Court is provided with this background for its convenience. It is clear, however, that the South Dakota proceedings are irrelevant to this appeal. Even if the South Dakota Supreme Court decision becomes final, the appropriate relief available to TV Signal or any other interested party is to be found in South Dakota. It is not the obligation of the Federal Communications Commission nor of this Court to decide whether Aberdeen Cable's business should be shut down solely because a local franchise requirement has not been met. There are available to interested parties the equitable and legal remedies of the South Dakota courts to pursue such relief.

CONCLUSION

Aberdeen Cable has been attacked on all fronts by its opponents in a frantic effort to remove it from the Aberdeen scene. This appeal is just one example of many such efforts. As the Court can appreciate, Aberdeen Cable is faced with the prospect of a serious setback under existing circumstances, if it is forced to terminate its interest within three years. Aberdeen Cable faces serious financial injury as it is; to be forced to terminate its activity prematurely would, we feel, be an economic disaster unjustified by any rational measure. The Court should affirm the Commission's action.

Respectfully submitted,

ABERDEEN CABLE TV
SERVICE, INC.

By Charles J. McKerns
Charles J. McKerns

By Donald P. Zeifang
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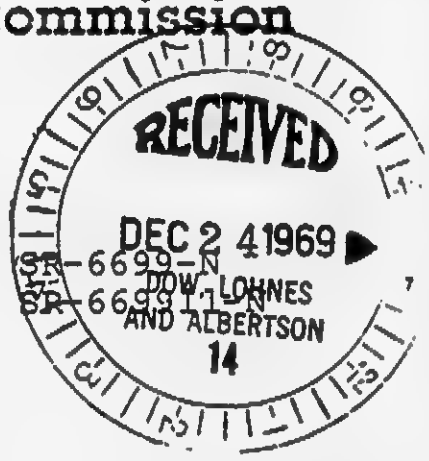
October 19, 1970

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.



In the Matter of Aberdeen, South Dakota, and Authorization of Aberdeen TV Cable Service, Inc. to Commence CATV Services.	) File Nos.	SR-6699-N SR-6693[illegible]-N
To: The Commission		

JOINT PETITION FOR RECONSIDERATION

TV Signal Company of Aberdeen and the Citizens Committee Against Monopolization of TV hereby jointly petition this Commission for reconsideration of that part of its Order (FCC 69-1280, adopted November 19, 1969) authorizing Aberdeen Cable TV Service, Inc. (a wholly-owned subsidiary of Midcontinent Broadcasting Company) to commence operation of its CATV system in Aberdeen, South Dakota and denying the Petition for Special Relief filed by the Citizens Committee Against Monopolization of TV.

1. Petitioners believe that the Commission is compelled to reconsider that part of its Order of November 19, 1969 authorizing Aberdeen Cable TV Service, Inc. -- Midcontinent Broadcasting -- to commence CATV services in Aberdeen, South Dakota. Its proposed rules of December 13, 1968, which in part would ban cross-ownership of a CATV system and a television station within the Grade B contour of the latter, would clearly prohibit any such authorization. 1/

1/ Aberdeen is within the Grade B Contour of KDLO-TV (Florence-Watertown), of which Midcontinent is the licensee.

While the Commission stated, in its Order, that its action was in no way designed to foreclose the possibility that Midcontinent would be ordered to cease CATV operations in the future (should the Commission decide to adopt its proposed cross-ownership ban), it is unlikely that the Commission would at such time require divestiture by Midcontinent of its CATV system in Aberdeen. 1/

2. The Commission, according to all public indications, is nearing resolution of its rule making proceeding in Docket 18397. Indeed, Broadcasting magazine, a most reliable trade publication, reported on November 3, 1969 (Vol. 77, No. 18) that the General Counsel had already recommended to the Commission that the proposed ban on cross-ownership within a TV station's Grade B contour be adopted. With resolution of the proceeding so near, with adoption of the prohibition so likely, and with the remedy of divestiture so improbable, Petitioners believe that application of the proposed cross-ownership ban on an interim basis would be appropriate, and consistent with past Commission practice.

3. Petitioners also suggest that the Commission direct its attention to the posture of Midcontinent's CATV activities in Aberdeen and other South Dakota communities, as

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1/ This remedy has, indeed, to Petitioners' knowledge , rarely if ever been utilized by the Commission in similar circumstances.

CERTIFICATE OF SERVICE

I, Donald P. Zeifang, hereby certify that copies of the foregoing "Brief for Intervenor" were mailed, postage prepaid, this 19th day of October, 1970, upon the following:

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REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,238

TV SIGNAL COMPANY OF ABERDEEN

and

THE CITIZENS COMMITTEE AGAINST MONPOLIZATION OF TV,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

THE UNITED STATES OF AMERICA,

Respondents.

Petition for Review of Orders of The Federal Communications Commission

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INDEX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA

No. 24238

TV SIGNAL OF ABERDEEN and
THE CITIZENS COMMITTEE AGAINST
MONOPOLIZATION OF TV,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA

Respondents,

ABERDEEN CABLE TV SERVICE, INC.,

Intervenor

On Petition For Review of Orders
of the Federal Communications Commission

REPLY BRIEF FOR PETITIONERS

I

THE PETITION FOR REVIEW IS NOT MOOT SINCE PETITIONERS HAVE NOT YET BEEN AFFORDED THE RELIEF WHICH THEY SEEK

Respondents and Intervenor argue that Petitioners have already received the relief which they sought before the Commission, and upon the denial of which this petition for review is based, due to the FCC's adoption of its Second Report and Order in Docket 18397 and rule 74.1131 which, as applied to Intervenor, will require divestiture of its Aberdeen CATV system within 3 years. Intervenor concludes, therefore, that Petitioners' arguments are moot. These contentions distort Petitioners' position and misconstrue the nature of the petition for review.

When Petitioners filed their petition for review in this case, the FCC's CATV-TV cross-ownership ban had not yet been adopted. The basis of the petition for review was that the Commission had abused its permissible range of administrative discretion in authorizing CATV services inconsistent with its existing media diversification rules and, as well, its proposed CATV-TV cross ownership rule. Petitioners had asserted before the FCC that authorization should be deferred or, alternatively, withheld pending final action on its cross-ownership rulemaking proposal; thereby,

if the Commission adopted the proposed ban, the public would be completely spared the disadvantages attendant to any cross-ownership of CATV and TV within the same community. Subsequent adoption of the proposed rules confirms Petitioners' contentions that authorization of Intervenor to commence CATV services in Aberdeen was inconsistent with the public interest. Now, however, because the Commission refused to defer authorization of Intervenor, the community of Aberdeen must, according to Respondents and Intervenor, bear the burdens of media cross-ownership for a period of three years; had the FCC deferred authorization, the community of Aberdeen would have been spared entirely of this burden.

Petitioners sought absolute prohibition of commencement of services by Intervenor,[1/] not merely divestiture of its operating system after 3 years. Surely, subjection of the community of Aberdeen to CATV-TV cross-ownership for a period of 3 years is not the equivalent of no cross-ownership at all. As Petitioners have not secured the sought relief, their arguments cannot be considered to have been rendered moot by the FCC's adoption of its Second Report and Order in Docket 18397.

1/ Alternatively, Petitioners sought deferral of authorization pending final action in Docket 18397, in which case Intervenor would have been prevented from commencing service subsequent to adoption of the FCC's Second Report and Order.

II

IT IS NOT NECESSARY FOR PETITIONERS TO DEMONSTRATE ABUSE BY INTERVENOR OF ITS CROSS-OWNERSHIP POSITION TO WARRANT GRANT OF THE RELIEF REQUESTED HEREIN

Intervenor argues that because Petitioners have not demonstrated abuse of Intervenor's cross-ownership position in Aberdeen, relief (other than divestiture within 3 years) is not warranted. Once again, we point out that the relief sought by Petitioners here and before the Commission is not predicated solely upon the newly adopted CATV-TV cross-ownership rule. It is instead based upon the premise that the FCC's authorization of Intervenor to commence service constituted an abuse of administrative discretion and that Intervenor should never have been permitted to commence services prior to final action in Docket 18397 as a matter of sound administrative judgment. We are not, as Respondents and Intervenor intimate, seeking relief (i.e., divestiture within 3 years) under the newly adopted §74.1131 of the FCC rules; we seek (as we sought prior to adoption of 74.1131) absolute prohibition. As our requested relief is not tied to newly adopted rule 74.1131, Intervenor's argument that it is necessary for us to demonstrate actual abuse in support of our request is misplaced.

III

THE LOCAL FRANCHISE ISSUE WAS OF RELEVANCE TO THE COMMISSION

The Commission has a clear interest in avoiding the abrupt withdrawal of viewing services from the public. As a corresponding duty, it must avoid the indiscriminate authorization of new services which can, in the near future, reasonably be expected to be withdrawn. Having been made aware that Aberdeen Cable TV's local franchise was disputed, and that the highest court of the State of South Dakota had ruled it invalid, and being aware that the services which it was about to authorize would likely be inconsistent with the cross-ownership rule about to be adopted, the Commission's authorization of Aberdeen Cable to commence CATV services constituted clear abuse of administrative discretion.

IV

THE PRECEDENTS RELIED UPON BY PETITIONERS SUPPORT GRANT OF THE REQUESTED RELIEF

Petitioners rely, in part, upon the cases of Miami Broadcasting Company, FCC 63-774, 1 RR2d 43 (1963) and Citizens TV Protest Committee v. FCC, 121 U.S. App. D.C. 50, 348 F.2d 56 (1965). Contrary to Intervenor's

contention, we demonstrate their relevance to the subject of the petition for review.

Intervenor notes that the Miami Broadcasting Company and Citizens TV Protest Committee cases were both decided prior to the adoption of any rule prohibiting the type of cross-ownership involved in each case, and that the latter was decided prior to the FCC's assertion of regulatory authority over CATV. This observation, we believe, strengthens our position that for the Commission to authorize CATV services which were inconsistent with its existing as well as proposed rules was clear abuse of administrative discretion.

In Miami Broadcasting, the FCC was faced with the proposed ownership by a newspaper of a television station, in the absence of any specific rule governing such ownership. The Commission met this problem head-on by stating that "[i]n any proceeding, comparative or not, the Commission has an obligation to determine whether potential grant [authorization] will result in a concentration of control of communications media inconsistent with the public interest. Clarksburg Publishing Co. v. FCC, 96, U.S. App. D.C. 211, 225 F.2d 511." 1 RR2d at 48. The Commission's adoption of rule 74.1131 and its Second Report and Order in Docket No. 18397 confirms that

CATV-TV cross-ownership in Aberdeen is inconsistent with the public interest; the Commission's conclusion that Intervenor's proposed new services were in the public interest was, therefore, erroneous and the FCC's authorization of Intervenor to commence services should be overturned.

In Citizens TV Protest, an even more analogous case, this Court stated in regard to CATV-TV cross-ownership that "the Commission has endorsed joint ownership of broadcast and CATV facilities only upon finding that its policy against duopoly was inapplicable because special circumstances made local service impossible under any other conditions." [Footnote omitted] 121 U.S. App. D.C. at 53, 348 F.2d at 59. The Commission presented no such justification in Citizens TV Protest and, accordingly, this Court reversed the Commission's decision and required a hearing on the cross-ownership issue. No such justification was presented by the Commission here in authorizing Intervenor's proposed new services. Indeed, an alternative source of CATV service to the community was present at all relevant times. If it was an error for the Commission to permit cross-ownership in the Citizens TV Protest case, where it was without benefit of regulatory guidelines, it must certainly have erred herein in authorizing cross-ownership in the face of its existing

and proposed rules.

WHEREFORE, for the foregoing reasons, Petitioners pray that the Court set aside and vacate the orders of the Federal Communications Commission authorizing Intervenor to commence CATV services in Aberdeen, South Dakota; enjoin Intervenor from continuing the unlawful operation of its system in Aberdeen; and remand the matter to the FCC with instructions that the matter be resolved in accordance with this Court's opinion.

Respectfully submitted,

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